

## Non-Treaty International Judicial Assistance: Current United States Practice

### A. Service of Judicial Documents

The first category of assistance concerns the formal delivery of legal documents in the United States. Upon the request of the Department of State, the Department of Justice, through the United States Marshals Service, will attempt to deliver legal documents to persons or entities within the jurisdiction of the United States and, if successful, will return to the requesting authority a certificate stating the time and place of service. The Department of State will transmit requests for service of process received through diplomatic channels to the Department of Justice for execution provided:

- the request originates with foreign *judicial* authority;
- the document is issued in connection with a judicial proceeding pending before the requesting authority;
- the request and the document to be served are translated into English;
- two sets of the document and its translation are supplied (one set will be served and the other will be returned by the Marshals Service together with the proof of service);
- each request is accompanied by a check or money order in the amount of \$15.00, payable to the Treasurer of the United States;
- a full name and street address is given for the individual or entity to be served (personal service cannot be made if only a post office box number is given); and
- every document issued for the purpose of notifying an individual of a hearing at which the individual's rights or obligations may be affected is received in the Department of State at least forty-five days prior to the date set for the hearing.

Requests for service transmitted through diplomatic channels need not be legalized or authenticated if the transmittal note confirms that the request

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\*Mr. Ristau is with the United States Department of Justice.

emanates from a duly constituted tribunal or other judicial authority of the requesting country.

Documents conforming to the foregoing requirements are forwarded to the Department of Justice for service by the Marshals Service in the manner provided for the service of similar documents in domestic actions (i.e., pursuant to Rule 4 of the Federal Rules of Civil Procedure), unless another manner is specified in the request. The Marshals Service will make diligent efforts to serve the document, but if service cannot be made after three attempts, it will be returned together with a written statement showing the dates, times and the place where service was attempted. If the designated recipient has moved, the Marshals Service will try to ascertain the forwarding address and cause the document to be served at that address without additional charge to the requesting authority.

Formal service of foreign judicial documents as set forth above does not, of itself, require the recognition or enforcement in the United States of any ensuing judgment which may be rendered by a foreign tribunal.

As regards delivery of foreign judicial documents in the United States generally, the United States has no objection to the informal delivery of such documents by members of diplomatic or consular missions, through the mails, or by private persons, provided no compulsion is used.

It should be noted that there is currently in force between the United States and France the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, done at The Hague on November 15, 1965, which provides a simplified and speedy method of serving French documents relating to civil cases in the United States.

## **B. Evidence**

Obtaining evidence for use in a foreign court proceeding is the second category of judicial assistance afforded to foreign tribunals and to litigants before such tribunals by the Government of the United States. (As used herein, evidence means the giving of testimony or statements, or the production of documents or other things.) The Department of State will forward requests for evidence to the Department of Justice for execution provided the request:

- emanates from a foreign *judicial* authority;
- is translated into English, and two copies of the request and of the translation are furnished;
- specifies the names and addresses of the parties to the proceedings and the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
- gives the full name, street address and relationship to the evidence of the person or entity from whom the evidence is sought;

- specifies the evidence to be obtained with particularity (e.g., by listing the questions to be put to the witness or providing a statement of the subject matter about which the witness is to be examined, or by identifying the documents or other subjects to be produced); and

- is accompanied by a statement from the Embassy transmitting the request guaranteeing payment of costs incidental to execution of the request.

In criminal cases, in which the person to be examined is a defendant, suspect, or a potential defendant or suspect, the request should also set forth the testimonial privileges which may be available to such person under the law of the requesting State.

Conforming requests are transmitted to the Department of Justice for execution in the judicial district in which the subject of the request is located. A representative of the Department of Justice in the appropriate district will communicate with the person or entity from whom the evidence is sought ("the witness"), and will request that the evidence be supplied voluntarily. If the witness accedes, his statement is taken under oath or affirmation (under penalty of perjury) before a notary public. The statement is then returned to the requesting authority, together with a copy of the request. If the evidence sought is a document or other thing, and is provided voluntarily by its custodian, it will be transmitted to the requesting authority in the same manner. (The custodian may require, as a condition of his cooperation, payment of costs by the Embassy, and assurance that the evidence will be returned.)

If the witness declines to produce the evidence voluntarily, a representative of the Department of Justice will petition the competent federal district court to apply appropriate measures of compulsion requiring the witness to produce the evidence. If the petition is granted, the court will enter an order authorizing the issuance of appropriate subpoenas and appointing a "commissioner" to secure the evidence. (Under United States law a judge seldom, if ever, secures the evidence himself.) The "commissioner" may be a person designated by the requesting authority. If the witness fails to obey the court order he may be punished for contempt of court, unless the information sought is subject to a legally applicable privilege.

As with respect to service of process, requests for evidence transmitted through diplomatic channels need not be legalized or authenticated if the transmittal note confirms that the request emanates from a duly constituted tribunal or other judicial authority of the requesting country.

There is no requirement that requests for judicial assistance be referred to the Department of State for execution; the federal statute which authorizes federal district courts to render assistance to foreign tribunals provides that such requests may be presented directly to the courts by "any interested person" (see Sec. 1782 of the *Judicial Code*). Direct presentation to a court of the

United States does not, however, mean the mailing or transmitting of a request to a judge or to a clerk of the court; it means a formal presentation through counsel.

The United States does not object to the formal taking of testimony by members of diplomatic or consular missions, or by private counsel, from witnesses in the United States, provided the witness agrees voluntarily to give testimony and no compulsion, threats or intimidation is used. If foreign officials, other than members of diplomatic or consular missions, engage in the securing of testimony in the United States, the Department of State expects to receive advance notification of that fact.

Complementing the Convention on Service, there is currently in force between the United States and France the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, adopted at the Eleventh Session of The Hague Conference on Private International Law on October 26, 1968. This Convention facilitates the transmission and execution of evidence requests, and accommodates the different methods employed by the courts of the United States and of France for this purpose.

### **C. Other Requests**

The Departments of State and Justice receive from time to time a variety of requests from foreign tribunals asking, for example, that their judgments be executed; that custody or alimony decrees be enforced; that property in the United States be sequestered; that witnesses in the United States be compelled to attend hearings in a foreign tribunal; or that an investigation of certain matters be conducted by a court of the United States. Such requests are beyond the scope of the authority granted to the courts by law; foreign judgments, decrees or orders cannot be enforced in the United States by means of a request for judicial assistance, and the Department of State will return such requests unexecuted.

Return of a request under these circumstances does not imply that a judicial remedy is not available in the United States; it simply means that the remedy cannot be had through the medium of letters rogatory. Under the laws of the United States, an individual seeking to enforce a foreign judgment, decree or order in this country must file suit before a competent court. The court will determine whether to give effect to the foreign judgment. As with most legal proceedings, it is necessary that the litigant abroad retain counsel in the United States to conduct the suit.